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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 542.

ANNA M. FOUNTAIN, *Petitioner*,

v.

PAUL FILSON and ANNA F. FILSON.

Petition for Writ of Certiorari Summarily Granted April 18, 1949, By Per Curiam, to the United States Court of Appeals for the District of Columbia.

RESPONDENT MOTION AND PETITION FOR REHEARING.

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RESPONDENT MOTION AND PETITION FOR REHEARING.

Respondents, Paul Filson and Anna F. Filson, by their attorney, respectfully move and petition the Court:

For rehearing in reconsideration of the summary *per curiam* grant of the petition for certiorari, and for consequent denial of the petition.

STATEMENT.

In support hereof, for respondents, the material matters are respectfully stated:

Below the trial court granted the motion of petitioner as defendant for summary judgment together with entry of final judgment for defendant against plaintiffs and for recovery of costs. Upon the appeal, the appellate court approved the grant of summary judgment, and stating the equitable duty of the trial court, also forthwith to decide the entire case upon the relief available to plaintiffs, ordered entry by the trial court of summary judgment for $6,000 against defendant, individually, and as the personal representative of her deceased husband, before his death a defendant party.[1] After the appellate court denied a defendant motion for modication of the order for personal judgment, the defendant petitioned for the grant of certiorari by this Court.

The Record filed by petitioner in support of the petition for certiorari, does not include the motion for modification of the appellate order filed by defendant in the appellate court. The record only includes the appellate order denying a motion for modification of the order. There is nothing to establish that any new issue came before or was passed upon by the appellate court.[2]

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[1] This statement omits that the trial court denied, but the appellate court granted substitution, as a party in his place, of Mrs. Fountain, the administratrix of her late husband. Consequently, the appellate court adjudged recovery of $6,000 against Mrs. Fountain as administratrix, and also personally against her. Her petition for certiorari is entirely against her personal liability under the appellate judgment orders.

[2] The Petition and Opposition do not show agreement that a new issue is involved, or that one is presented:

(A) The petition states:

(p. 3) Petitioner promptly moved for modification of the judgment on the ground that the Court of Appeals could not and should not do more than remand the case for further

By construction of the application of Rule 56, this Court granted the certiorari on the specific ground that "*here the order was made on appeal on a new issue, as to which the opposite party had no opportunity to present a defense before the trial court*".

GROUNDS FOR REHEARING.

As objections to the present grant of the petition for certiorari, and as cause for denial of the petition, for petitioners, it is respectfully represented:

(a) The predicate of the *per curiam* that the appellate court erroneously decided a new issue, on which the defendant should be heard, is not shown by the record, and has no existence.

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proceedings, but the motion was denied without opinion (R. 68).

* * * * * *

(p. 8) In this case, there can be no doubt that the Court of Appeals did not have all of the evidence bearing on the facts basic to the acknowledged indebtedness theory.

(p. 9) After the surprise decision of the Court of Appeals, moreover petitioner hastened to assure the Court that she would, if afforded an opportunity, testify, by affidavit or in person,[9] to a version of the transaction far different from that reflected in Judge Clark's opinion. She renews that assurance in this Court and states her bona fide belief that she can show, at the least, a genuine dispute over several key facts.[10]

[9] In either the District Court or the Court of Appeals.

[10] Among the facts which petitioner's testimony would tend to establish are clear understandings among the parties (a) that she and her husband were not to assume responsibility for payment for certain repairs effected under the respondent Paul Filson's direction, and (b) that the respondents were to have no further interest in the property upon expiration of their three-year repurchase option.

(B) The Opposition likewise is rested upon the barren motion for remand by its single statement:

(p. 4) Her subsequent motion for modification of the appellate court judgment into a remand for further proceedings was denied.

(b) The principles of the *Cone* and *Globe Liquor* precedents are not applicable in the present case.

RULES INVOLVED.

United States Supreme Court:

Rule 10.3: "No case will be heard until a record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing, shall be filed."

Federal Rules of Civil Procedure:

Rule 54(c) *Demand for Judgment.* "* * * Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Rule 56(d) *Case not fully adjudicated on motion.* "If on motion under this rule judgment (for summary judgment) is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

ARGUMENT.

The argument is that a new issue is not presented, and, herefore, is not available as the basis of decision of the etition for certiorari, and, if assumed available, that the ssue is not one subject to trial under existing rules and recedents.

The new issue is not disclosed by the record which entirely omits the motion for modification of the appellate rulings that must have stated the matters of facts underlying the new issue.

The petition for certiorari and the opposition do not disclose a new issue.[3]

Not being established in the record, in the petition or in the opposition, the alleged new issue has no existence, and no place in the *per curiam* statement as the turning point of the case.[4]

Assuming the propriety of a trial of the alleged new issue is involved, the right to trial is best measured by the appellate consideration of the situation as being that where the trial court heard the entire case.[5] In this situation, the appellate court holds the trial court would have granted the defendant motion for summary judgment that plaintiffs were not entitled to the preference of a resulting trust, and also would have entered a personal money judgment against the defendant, individually, and as administratrix of her deceased husband, in favor of plaintiffs, as their entitled general relief.

Such proceedings, it is submitted, would be admittedly proper in the trial court. Rule 56(c) prescribes that, in ruling on a motion for summary judgment, the trial court shall also, by examination of the pleadings and evidence on file and interrogation of counsel, ascertain and state the facts not in material controversy, and so confine any subsequent trial to the remaining facts in material controversy.

[3] See Note 2 *supra* for their presentation.

[4] Revised Rules of this Court:

> 10(3). No case will be heard until a record, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceedings which are necessary to the hearing, shall be filed.

[5] The Petition adopts this viewpoint by saying:

> (p. 3—Note 1) The case was treated, in short, as though it had been fully tried in the District Court.

as the right to trial depends on the existence of material controversy.[8] Rule 54 also makes it the duty of the trial court to enter a final judgment for the entitled party if no material facts appear substantially in controversy.

As further proceedings in the trial court, it will appear defendant, individually, moved for modification of the judgment for plaintiff, for cause that she should be heard testifying that the parties had understandings, first, that she and her husband were not to be responsible for all of the Filson repairs, and, second, that the Filson claim of interest in the property expired with the unexercised option.

Respondents submit her motion, in the aspects of modification of the personal judgment, or of a new trial, would be denied on the following grounds.

The motion predicates the judgment orders are proper, under Rules 54 and 56, unless defendant shows material cause against their finality. The motion cannot attack the judgment against defendant as the personal representative of her late husband, as it is directed entirely against, and limited to, her personal liability, and therefore only her liability for the repairs would be presented. The pleadings dispose of both claims made on the motion as they raise no issue as to any liability for repairs, and they expressly admit the defendants did not deny the plaintiffs' claim to interest in the property until September, 1945, nearly five years after expiration of the option. Her execution of the option shows the defendant admitted $15,000 to be the property value during the next three years by agreeing to pay

[8] *Carpenter* v. *Winn*, 221 U. S. 533, 538-9; 31 S. Ct. 683; 55 L. Ed. 842, 844:

"Blackstone defines 'trial' to be the examination of the matters of fact in issue. 3 Bl. Com. 330. This definition is adopted by Bouvier. In Miller v. Tobin, 9 Sawy. 401, 411, 18 F. 609, 616, Judge Deady applied this meaning to the removal act, saying:

"'Trial' is a common law term, and is commonly used to denote that step in an action by which issues or questions of fact are decided."

$6,000 in addition to the mortgage assumption of $9,000 in order to release the option and quiet the Filson interest. Non-exercise of the option discharged the Filson right to repossess the property, but not the Filson interest in the property.[7] The matters of fact relied on in the motion were always known to defendant, and not made grounds for defense, and, therefore, are not available as grounds for a new trial.[8]

Respondents submit defendant has presented no new issue available or material in opposition to the personal judgment against her.

In the foregoing or otherwise, the principles of *Cone*[9] and *Globe Liquor*[10] have no application. They are in construction of Rule 50 as to jury trial procedure as inclusive of certain discretionary rights to be exercised only by the trial court. Here was no jury trial, and instead, is a case subject only to Rules 54 and 56. Extension of this case, under the *Cone* and *Globe Liquor* principle, means the nec-

[7] *Western Union Tel. Co.* v. *Brown*, 253 U. S. 101, 110; 40 S. Ct. 460, 64 L.Ed. 803:

> "An option is a privilege given by the owner of property to another to buy the property at his election. It secures the privilege to buy, and is not, of itself, a purchase. The owner does not sell his property; he gives another the right to buy at his election."

[8] *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 425, 43 S. Ct. 58, 67 L.Ed. 719, 730:

> "We are prevented from knowing it by a most salutary rule of law, which after parties have had a full and fair opportunity to prepare their case, refuses to permit them to drag out litigation by bringing in new evidence which, with due diligence, they ought to have discovered before the hearing. The apparent hardship of particular cases should not and cannot weigh against the application of this sound principle. As Mr. Justice Story remarked in Ocean Ins. Co. v. Fields, 2 Story, 59, Fed. Cas. No. 10,406: 'It is for the public interest and policy to make an end to litigation; or, as was pointedly said by a great jurist, that suits may not be immortal while men are mortal.'"

[9] *Cone* v. *West Virginia P. & P. Co.*, 330 U. S. 212; 91 L.Ed. 849.

[10] *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571; 92 L.Ed. 177.

essary return in the future, of cases to the trial court for further proceedings instead of their summary disposal in the appellate court.

The *per curiam* holds, in its conclusion that the trial court should have considered the plaintiff claim for personal judgment, that the appellate court erred in depriving Mrs. Fountain of an opportunity to dispute facts material to that claim by ordering summary judgment against her. The appellate court, not informed of the disputed facts, certainly denied no opportunity to Mrs. Fountain. This case does not show the appellate court was so informed.[11]

For respondents, it is submitted the *per curiam* grant rests upon premises not established in the case presented, and that instead, the petition should be denied.

Respectfully submitted,

CAMDEN R. MCATEE,
Attorney for Respondents.

CERTIFICATE.

The undersigned certifies the foregoing motion and petition is presented in good faith, and not for delay.

CAMDEN R. MCATEE,
Attorney for Respondents.

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[11] Petitioner designation of the record, underlying the petition for certiorari, only includes the appellate order in denial of the Fountain motion for modification of its judgment order, and for remand of the case for further proceedings. Omission from the designation, and from the record, of the Fountain motion, on which the order of denial was made, puts aside any consideration, by the parties or by this Court, of appellate discretion exercisable in ruling upon the motion. Under Rule 10-3 it cannot be assumed the appellate court ever was advised of or disregarded any contentions of Mrs. Filson which required its discretionary consideration in ruling upon her motion. Petitioner has elected not to disclose for consideration in this Court whatever the Fountain motion may have disclosed to the appellate court.